SUPREME COURT, U. S.

No. 223

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In the

Supreme Court of the United States

OCTOBER TERM, 1968

JAMES MAHONEY, JUNE MAHONEY and JOHN MAHONEY, a Minor, by his Father and next friend, JAMES MAHONEY: For and on behalf of themselves and for all other depositors of MARSHALL SAVINGS AND LOAN ASSOCIATION who are situated similarly to them.

Petitioners,

vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a body corporate and an instrumentality of the United States,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners,

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FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a body corporate and an instrumentality of the United States,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to review a judgment of that Court entered on March 26, 1968 reversing a judgment of the United States District Court for the Northern District of Illinois. No re-hearing was sought by petitioners.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit rendered March 26, 1968, is reported in ..... F.2d ..... and is printed in the appendix herein at page 1a et seq. ("P 1a" refers to the appendix to this petition. The certified transcript filed here is the Appendix to the Appellant's Brief in the Court of Appeals. References to it are: "Appendix ....." or "A .....").

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC Sec. 1254.

QUESTIONS PRESENTED FOR REVIEW

1. a) Does federal law or state law govern the right to Federal Savings and Loan Insurance Corporation (FSLIC) insurance of shareholder accounts in an insured savings and loan association?

b. If federal law governs, are petitioners and the class they represent entitled to insurance on their accounts under federal law and FSLIC regulations?[1]

2. Are petitioners' accounts otherwise insured in the light of FSLIC long standing policy determinations respecting the National Housing Act, made in the light of its awareness of industry representation to the public?

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[1] The court below held state law governs and applying such law, the accounts were not separately insured. We think the State law holding was erroneous but do not regard that question as appropriate for review here.

STATUTES AND REGULATIONS INVOLVED

The National Housing Act, 12 USC § 1701 et seq.
Sec. 401 (a), (b) and (c), 12 U.S.C. § 1724 (a), (b) and (c) provides:

(a) "The term 'insured institution' means an institution whose accounts are insured under this subchapter.

(b) "The term 'insured member' means an individual, partnership, association, or corporation which holds an insured account. . . ."

(c) "The term 'insured account' means a share, certificate, or deposit account of a type approved by the Federal Savings and Loan Insurance Corporation which is held by an insured member in an insured institution and which is insured under the provisions of this subchapter."

Sec. 405 (a), 12 U.S.C. §1728 (a) provides:

"Each [insured] institution . . . shall be entitled to insurance up to the full . . . value of the accounts of each of its members and investors (including individuals, partnerships, associations and corporations) . . . except that no member of investor . . . shall be insured for an aggregate amount in excess of $10,000.00."

FSLIC Regulations, 12 C.F.R. §561.3:

"*Joint account; community property.* An insured account held jointly is insured in the same manner as an insured account held by a partnership, up to but not exceeding $10,000.00 jointly to the holders thereof. Each of such holders may in addition hold a separate account in the institution, which is insured up to but not exceeding $10,000.00 . . ."

STATEMENT OF THE CASE

This case presents the question whether a federal program designed to provide insurance to millions of depositors in savings and loan associations and banks throughout the country should be administered with uniformity and certainty in accordance with federal law or subjected to the vagaries, inconsistencies and conflicts of the laws of the 50 states. It arises out of the following facts:

This is a class action against FSLIC by petitioners on behalf of themselves and all other similarly situated shareholders of Marshall Savings and Loan Association to recover FSLIC insurance. Jurisdiction of the District Court rested on 28 USC § 1331 and 12 USC § 1725(c)(4) in that the amount in controversy exceeded $10,000 and arose under the constitution and laws of the United States.

Marshall defaulted on April 8, 1965. Petitioners, father, mother, a minor son and a minor daughter held three separate accounts as follows:

Account No.	Account Holders	Balance at time of Default
62030	Mahoney, June, or Mahoney, James or Mahoney, Patricia (a minor)	$ 7,377.41
59869	Mahoney, James or Mahoney, June	10,341.32
62387	Mahoney, James or Mahoney, June or Mahoney, John	6,490.76
		$24,209.49

All accounts were opened between September and December 1963 about one year before Marshall closed.

After Marshall failed, plaintiffs filed claims totalling $24,209.49, but FSLIC refused to pay more than a total of $10,000.00 on all three accounts, (then the insurance

limit) claiming that they were a single account under state law. The names of the son and daughter appeared on account books and ledger cards, but FSLIC relied on the account signature cards to deny liability. It asserted that the accounts were joint tenancy accounts; under Illinois law each joint tenant must sign the signature card to be a joint tenant; Patricia had not signed the signature card on account No. 62030; hence under Illinois law she was not a joint tenant and, therefore, the ownership of No. 62030 under Illinois law was identical with that of Account No. 59868. It took a similar position with respect to Account No. 62387. Hence, FSLIC asserted, all three accounts were in the names of James Mahoney and June Mahoney, and the $10,000.00 limitation was applicable to the three accounts as a group. FSLIC maintained this position even with respect to account No. 62030, where the signature card was on a tenancy in common form, merely because the signature card, but not the ledger sheet, was stamped "As joint tenants with the right of survivorship, and not as tenants in common."

The loss to this one family is $13,868.17 ($24,209.49, less $10,000.00, less the $341.32 amount over $10,000.00 in Account No. 59869). The loss to all members of the class is about $90,000.00 ($270,206.55 less $180,000.00).

This two count action was filed on August 3, 1966. After appropriate proceedings the court ordered that the case proceed as a class action. The court denied an FSLIC motion for summary judgment entering Findings of Fact (Appx. 21-25) and Conclusions of Law (Appx. 25-27).

The District Court held that the right to federal deposit insurance is a question of federal law, and consequently, that Illinois joint tenancy law is inapplicable. It

found the accounts to be separately insured under federal law, FSLIC regulations, and FSLIC administrative interpretations of the ruling statute.

The Seventh Circuit granted the FSLIC petition for an interlocutory appeal under 28 USC § 1292 (b). It reversed the District Court and remanded with instructions to grant judgment for defendant. In effect, it rejected the contention that federal law governed, held that under state law the minors' signatures on the account cards were indispensable, and rejected the District Court holding that the accounts were insured under FSLIC administrative interpretation of the statute.

For the convenience of the Court we set out at p. 17a an enlarged copy of a joint tenancy signature card, the form employed for all of the accounts of the class, except Mahoney Account No. 62030. (There the signature card is a tenancy in common form, summarized at p. 6a.)

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals Rejection of Established Principles of Law Formulated by This Court Raises A Significant Issue of Federal Law Which Should Be Decided By This Court:

Is The Right To Federal Savings And Loan Insurance Governed By Federal Or By State Law?

The issue raised by this case is of fundamental importance in the administration of the federal statutes and regulations governing the insurance of deposits in savings and loan associations. It is hardly necessary to stress the importance of savings and loan institutions to our economy. As of September 30, 1966, there were 4,513 state and federally chartered savings institutions insured by FSLIC. They held 40,101,000 accounts representing $107,416,336,000 in deposits (A 32). By December 31, 1967, the savings deposits had grown to $121,579,000,000. Moreover the issue arising in this case affects also banks insured by the Federal Deposit Insurance Corporation. The FDIC insures 13,850 banks, 193,000,000 accounts and deposits totalling $448,708,885,000 (Dec. 31, 1967 FDIC Report of Call).

The essential question raised by this petition is whether the right to federal insurance of a savings and loan account is governed by federal law, as we contend, or by state law as the Court of Appeals below held.

The context in which the question is raised concerns only the matter of signatures required for an insured account. But the question whether federal or state law governs transcends this narrow issue. Many other problems can be

expected to arise which will affect the right to federal insurance, such as, the effect of minority or competency of the depositor. Insurance coverage for millions of small savers, many of whom have invested their entire savings, relying upon FSLIC and FDIC insurance should be certain in every respect. The rights of such savers should not depend on 50 bodies of state law, each with its own traditions and approach, with conflicting and inconsistent rules. What is held out to savers is a federally administered national program guaranteeing their savings. Moreover, the decision below holding state law applicable to federal insurance cast doubts on the validity of new, substantially uniform regulations issued several months ago by FSLIC and FDIC specifically overriding state law in numerous respects. (See p. 18 post.). Review here is warranted to establish clearly that federal law alone applies to federal insurance.

Insurance coverage for millions of small savers, many of whom have invested their entire savings relying upon FSLIC and FDIC insurance should be certain in every respect.

The federal-state law question was briefed and argued to the Court of Appeals, yet it dismissed the issue in a few sentences without discussing or even citing a single case.

The Court of Appeals referred to the definition of "insured member" in the statute cited above (p. 3) but not to the definitions of "insured institution" and "insured account" and then stated "The federal statute and the regulation in the form it had in 1965 simply assumed that a 'member' can be identified. This federal statute, does, of course, provide insurance protection for rights created by transactions governed by state law. It implies,

we think, that the law which governs the creation of rights and obligations between account holders and associations answers the question as to the identity of the 'member' when applied to the facts." (P. 3a)

We think this simplistic approach ignores the statute, FSLIC regulations, prior holdings of this Court and other federal courts dealing with the question, overlooks key facts of the case and finally overlooks the fundamental purpose of Federal Savings and Loan Insurance.

A. *The Statute*

The National Housing Act provides evidence that federal law governs.

1. The National Housing Act on its face reveals an intent to make that statute controlling as to federal insurance rights. The Court of Appeals cites the definition of "insured member"—"an individual partnership, association or corporation which holds an insured account." The term "insured account" is defined in § 405 (c) to mean an account of a type approved by FSLIC held by an insured member in an insured institution and which is insured under the Act. "Insured institution" is defined in § 405 (a) to mean an institution whose accounts are insured. These definitions, at least in part may be circular: we may fault the draftsman, but they undoubtedly are meant to be self-contained. There is no suggestion that we are to look to state law to resolve issues of definition. The implication is that we are to look only to §405 itself in resolving the meaning of the terms there defined.

2. Suits under the National Housing Act arise under the "laws of the United States", a general ground for federal jurisdiction. *FSLIC* v. *Third National Bank,* 153 F. 2d 678 (CA 6th 1946).

3. The National Housing Act for years has provided, 12 U.S.C. 1725 (c) (4), that FSLIC has the power "(4) to sue and be sued, complain and defend in any court jurisdiction in the United States. . ."

On October 16, 1966, the Act was amended by the Financial Institutions Supervisory Act, P.L. 89-695 to add a new provision, 12 U.S.C. 1730 (k) (1) reading as follows:

> "Notwithstanding any other provisions of law, ... (B) *any civil action,* suit or proceeding to which the Corporation shall be a party *shall be deemed to arise under the laws of the United States,* and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; . . ." (Emphasis added)

This amendment was added in the light of Mr. Justice Jackson's observation, in a concurring opinion in *D'Oench, Dohme* v. *U.S.,* 315 U.S. 447 at 468, 62 S. Ct. 676, 86 L ed. 956 (1942) regarding the FDIC statute. That law too had a "sue and be sued" clause and a "deemed to arise" clause. To Mr. Justice Jackson, the latter phrase was not a mere jurisdictional grant (already conveyed by the former) but a signal that federal law was to apply to suits arising under the statute. The adoption of the FDIC statutory pattern, in light of the history points to a similar result here.[2]

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[2] It is clear that the §1730(k)(1) amendment is declaratory of existing law. Hence the rule enunciated by §1730(k)(1) applies to this action filed before P.L. 89-695 became law, even though Section 102(b) of P.L. 89-695 (See note 12 U.S.C.A., Pocket Part, 1967, p. 168) makes the amendment formally applicable only to "proceedings" commenced after its effective date. It is not reasonable to suppose that Congress intended one substantive rule of law to apply in one case, and another in a second case, depending not on the date the cause of action arose, but on the date suit was filed.

B. The Case Law

The right to federal insurance is a federal right, to be decided by federal law, not by state law. *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448 (1957); *Sola Electric* v. *Jefferson Electric,* 317 U.S. 173.

In *Lincoln Mills* this Court held that federal law applied to arbitration suits under § 301 of the Labor-Management Relations Act because:

> "It is not uncommon for federal courts to fashion federal law where federal rights are concerned." (353 U.S. at 457).

In *Sola Electric* an estoppel defense in a suit by a patentee against a licensee was held to be governed by federal law. This Court said, "The prohibition of a federal statute cannot be set at naught, or its benefits denied by state statute or state common law rules." (317 U.S. at 176).

In *United Gas Improvement Co.* v. *Continental Oil Company,* 381 U.S. 392, 400, 14 L.Ed. 2nd. 466 (1965), a decision under the Natural Gas Act, this Court observed that the Natural Gas Act "would be ham-strung if it were tied down to technical concepts of local law". *Clearfield Trust Company* v. *U.S.,* 318 U.S. 363, 367, 87 L.Ed. 838 (1943) holds that federal law, not state law, governs commercial paper issued by the United States. "In the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." *D'Oench, Dohme,* mentioned p. 10 ante demonstrates the reach of the principle. There a note was given to a bank which subsequently was acquired by FDIC. It acquired the note as collateral for a loan and sued. The maker asserted a secret agreement with the bank not to enforce collection. This Court held that federal, not state law applied to the

maker's obligations. Such question is a typical state law issue, but it became a federal question when the note was assigned to FDIC, an agency not even created when the note was given. *Case* v. *Borak,* 377 US 426, 12 L ed 2d, 423 (1964) in another context demonstrates the rule: The remedy for violation of the proxy rules issued under Sec. 14(a) of the Securities Exchange Act of 1934 is fashioned by a federal court applying federal law, free from impediments of state law. *U. S.* v. *93.970 Acres,* 360 U.S. 328 (1959) holds that state law rules concerning election of remedies are inapplicable to federal condemnation.

This very term, this Court held in *Hughes* v. *Washington,* ..... US ....., 19 L. ed. 2nd 530 (1968) that federal law applies in determining the scope of a federal grant of land. There the land was conveyed before Washington became a state in 1889. At issue was whether accretion belonged to the grantee's successor or to the state. This Court applying federal law held that the accretions belonged to the grantee.

The bulk of these authorities were advanced in the Court of Appeals. But it failed to discuss a single case on the federal-state law issue but turned at once to State authorities, saying: "It must first be determined whether, under the applicable state law, there is an account held jointly." (P. 7a) This was clear error.

C. *Need For National Uniformity*

Surely, it is Congressional policy to insure and protect the savings of depositors for which the insured savings and loan associations pay premiums. There is a need for national uniformity to avoid enmeshing federal authorities in the complexities of the law of 50 jurisdictions where the sole purpose of federal law is to provide

federal insurance. Surely Congress did not intend that the right of federal insurance would be available to the citizens of some states but not to citizens of others, depending on the vagaries of the laws of 50 different states. In the court below FSLIC cited *Connor* v. *FDIC,* 112 Vt. 380, 26 A.2d 105 (1942), where the court held valid, under state law, a joint tenancy even though only one party signed the signature card. Thus, in Vermont plaintiffs and the class would recover. Precisely to avoid such problems, FSLIC recently issued regulations, discussed at p. 17 post, establishing uniform national rules. A uniform national rule should be here applicable.

There is a similar need to avoid conflicts questions. Suppose the savings and loan institution is in state X. One depositor resides in state Y and another in state Z. What law do we choose? Suppose a state has no statute or case law on a question. Do we look to bank account analogues, personal property analogues, real property analogues, or to what?

Insurance to be meaningful must be certain. It should not be a sometime thing depending on the law of a particular state.[3]

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[3] FSLIC may seek to reconcile its new regulations and the Court of Appeals decision by relying upon an October, 1966, amendment to Sec. 405 (a) of the National Housing Act, 12 USC § 1728 (a). That amendment authorized FSLIC to "define" the terms "insured member", "insured account" and terms relating to the $15,000 limit. The provision seems only to give to FSLIC a portion of the general rule making power given to its parent, the FHLBB in 1934 in Sec. 1725 (a) and exercised by it for decades. See, e.g., the very definition of "insured member" and "insured account" at p. 3, ante. There is no suggestion in the amendment of an explicit shift from state to federal law as the insurance standard and hence it cannot be relied upon to justify the new regulations.

II.

This Court Should Consider Whether Petitioners Are Entitled To Deposit Insurance Under Federal Law and FSLIC Regulations.

When interpreting a statute it is a cardinal rule that we should ascertain and implement the purposes of the act. Respecting deposit insurance, no elaborate legislative research is necessary. Its purpose is within the personal knowledge of millions of Americans who lived through, indeed, who suffered through, the tragic bank collapse of the early 1930's. It culminated in a "bank holiday" where every bank in the United States was closed for several days.

Deposit insurance was born of that calamity. It was provided to protect the savings of the investing public by providing government insurance of their funds. That aim has been eminently successful. Recently the Honorable Wright Patman, Chairman of the House Banking and Currency Committee and Chairman of the House Senate Joint Economic Committee, said:

> "But, the greatest single action of government to restore public confidence in our banking system has been Government Deposit Insurance." Congressional Record 23,997, column 2, October 4, 1966.

Every government agency has an obligation to deal openly and fairly with every citizen. But some agencies deal with the sophisticated and the affluent. Not so the FSLIC. It deals with everyone. Surely this agency, more than most agencies, is bound to speak with the utmost precision and clarity.

We have shown above that federal law applies in determining the right to FSLIC insurance. It remains to show that under federal law and FSLIC regulations the

accounts of petitioners are in fact insured. This issue the Court of Appeals failed to meet. FSLIC Regulation § 561.3 (p. 3, ante) provides expressly that an "account held jointly" is insured in the same manner as an insured account held by a partnership.

There can be no question that all partners need not sign a signature card—any one may sign on behalf of all. This, FSLIC conceded below (FSLIC Court of Appeals Br. 11). For this purpose the law of partnership has a "nationwide meaning" which "disregards minor local variants or an occasional legal sport" as Mr. Justice Frankfurter stated, concurring in *Commissioner* v. *Culbertson*, 337 U.S. 733, at 751, 93 L.Ed. 1659 (1949).

The one signature rule finds cogent support in the joint tenancy signature card itself, reproduced, and enlarged on p. 17a. *The form states categorically in the very last line on the left, "One Signature required," immediately under the signature lines.* This very form had to be submitted to FSLIC by Marshall and had to be approved by FSLIC. FSLIC Regulation 563.1 requires that every applicant for FSLIC insurance submit to FSLIC for approval copies of all "savings account, share account, membership stock and deposit certificates, passbooks and other forms of investment contracts proposed to be issued by the applicant as an insured institution." The Regulation further provides "no insured institution . . . shall issue any form of savings account, share, stock, membership or deposit certificate, passbook or other investment contract which has not been approved in writing by the corporation."

In the fine print (we use the phrase literally, not figuratively) the form speaks of "the undersigned" establishing an account, appointing proxies, etc. But at the

top of the card is a space for three names, and at the bottom, lines for three signatures.

The very last line of the card, just below the signature lines, states categorically "One Signature required." Why was such language approved by FSLIC? The answer is quite evident: This language reflects exactly the requirements spelled out in FSLIC Regulation §561.3: an "account held jointly," since it is insured as a partnership account, is insured even though the signature card is signed by only one of the account holders.

The court below rejected these arguments, claiming that the "one signature required" legend means only one signature is necessary for withdrawal, not to establish a valid account.[4] But the form was intended for the use of non-lawyer depositors and non-lawyer clerks. What does it mean to them? Clearly that the individuals whose names are listed at the top of the card become depositors in the account when the card is signed by one of their number, since the last line reads "one signature required." This, we submit, is the natural meaning of the language approved by FSLIC.

Yet, after default, FSLIC denies insurance to some accounts relying on an erroneous claim of state law applicability. Upon this, the court below imprints its cachet.

In Part I, we show generally the error of this reasoning. Here let us add that the Court was led to State law

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[4] Account No. 62030 in the names of James and June (the parents) and daughter Patricia uses a tenancy in common signature card which has a joint tenancy stamped legend on it. There is no state law signature requirement as to such accounts. Yet the court below denies recovery to James and June and does not even mention the possible rights of Patricia.

joint tenancy law by two errors. First, it made the erroneous assumption that a federal regulation on "accounts held jointly" complete on its face, nonetheless imported state law joint tenancy concepts. Second it made the erroneous assumption that an "account held jointly" under the regulation *is* a state law "joint tenancy." In fact the term was a FSLIC invention which embraces all forms of co-ownership accounts, no matter how designated by local law. It can include a joint tenancy, or a tenancy in common or any other form of multiple ownership.

Sec. 561.3 is the sole provision in the regulation concerning accounts held by more than one person. If the term "account held jointly," refers only to an account held in joint tenancy, the regulation would be wholly silent on the insurance status of tenancies in common and tenancies by the entirety. This construction scarcely could have been intended.

This very case raised the problem. Of petitioners' three signature cards, only two were on joint tenancy forms. One was on a "tenancy in common, or individual" form. (See p. 5).

The recent revision of FSLIC regulations, effective September 1, 1967, 32 FR 10415 (July 14, 1967) revising 12 CFR § 564.9 (a) (32 FR 10416) uses the term "account owned jointly" to include joint tenants, tenants by the entireties, and tenants in common. *Thus our claim about the scope of the prior term "account held jointly" received confirmation from FSLIC itself.*

We advanced this argument to the Court of Appeals. That court, however, misapprehended its thrust for it observed that current regulations expressly require all

joint owners to sign (§564.9 (b)). This response is true but inapposite. We cited the new regulations not as applicable to this case, but because its definition of "account owned jointly" sheds a revealing light on the prior comparable term.

The new regulations have another and deeper significance. They raise in stark fashion the fundamental questions whether federal or state law applies. They do so because the new regulations disregard all pretense of relying on local law. Thus they specifically require signatures of all co-owners, whether required or not by local law (Sec. 564-9 (b)). An association, partnership or corporation is insured as such if engaged in "independent activity" but if it is not so engaged it is disregarded for insurance purposes and its accounts considered as the property of its members or shareholders. (Secs. 564.6 and 564.7). Thus even corporations validly established by local law may be disregarded. Hence while the signature issue raised by this case is put at rest for the future by the new regulations,[5] the underlying issue of federal-state law is sharply presented. The decision below rests on the premises that state law is fundamental. The new regulations disregarded state law. Considering the millions of insured accounts, the billions insured, and considering particularly the enormous potential impact upon

[5] The old regulation does have continuing importance however. The new regulation became effective September 1, 1967, but accounts insured under the old regulations remained insured until April 15, 1968. (See § 564.11). Prior to April 15, 1968, in the Chicago area, Lawn Savings & Loan Association, Apollo Savings and Loan Association, and Old Reliable Savings and Loan Association went into default. They had accounts together well over $136,000.000 and in each case, no doubt the signature question will arise as to some account holders.

millions of small savers, review by this Court seems clearly warranted.

III.

This Court Should Decide Whether:

(1) Petitioners' Accounts Are Insured In the Light of FSLIC Long-Standing Policy Determinations Respecting the National Housing Act, Made in the Light of Its Awareness of Industry Representations to the Public.

(2) The Court of Appeals Misapplied Federal Crop Insurance Co. v. Merrill, 332 U.S. 380 (1947).

We contend that the accounts of plaintiffs and the class they represent are insured under long-standing FSLIC administrative determinations respecting the National Housing Act. These determinations assume special importance because of FSLIC awareness of industry representations to the public regarding FSLIC insurance. These contentions the Court of Appeals dismisses saying:

> "The imposition of responsibility on FSLIC for plaintiffs' failure to achieve their purpose would be dubious under these circumstances even if FSLIC were not a government instrumentality. In addition, because it is, its funds are protected by the law even where its agents may have caused people to misunderstand the law."

The court cited as authority *Federal Crop Ins. Corp.* v. *Merrill* (1947), 332 U.S. 380, 68 S. Ct. 1, 92 L.Ed. 10, 175 A.L.R. 1075.

The court below misapprehended the findings of fact of the District Court and misapplied *Merrill.* As to the findings:

Findings 12 and 13 (Appx. 24) state facts personally known to the members of this Court:

> For many years savings and loan institutions have informed the public by signs, pl[redacted] advertising, television, radio and otherwise that "accounts" in their institutions were insured to $10,000 by FSLIC. Such statements induced the public to believe that each separate account was insured to $10,000. Other advertising induced the belief that two or more accounts were insured to $10,000 each so long as there existed any difference of ownership between them.
>
> Finding 14 (Appx. 29) is that the depositors here were of such belief and some were so informed by Marshall employees when their accounts were opened. But for that, they would not have deposited more than $10,000 in Marshall. FSLIC knew, or should have known of the practice of making such statements by savings and loan institutions, and knew or should have known that such statements would induce the beliefs set out above. At no time, however, did FSLIC direct savings and loan institutions (including Marshall) to cease making such statements.
>
> Further, Finding 15 (Appx. 25) is that FSLIC had authority to audit and did audit records of Marshall. An examination of the signature cards prior to Marshall's insolvency would have revealed to FSLIC that the depositors had two or more accounts differing as to account titles, signature cards, or in other respects. The depositors regarded each of these accounts as separately insured. FSLIC knew, or should have known this fact. If FSLIC did not so regard the accounts, it had a duty to so inform the depositors. Yet, at no time prior to Marshall's insolvency did FSLIC inform the depositors that it regarded these accounts as a single account."

Hence, the District Court concluded as a matter of law (Appx. 26-27):

> "8. FSLIC administrative policy of many years' duration, with respect to savings and loan associations advertising and public statements, constitutes an administrative interpretation of the statute and FSLIC regulations that each of the accounts of plaintiffs and each of the accounts of other such depositors is separately insured and FSLIC is estopped from asserting the contrary."

It is clear that the conclusion of law is firmly grounded in the Findings of Fact, particularly since FSLIC has specific statutory authority to regulate advertising (12 U.S.C. 1726(b) and FSLIC regulations bar false advertising:

> "No insured institution shall use advertising (Whether printed, radio, display, or of any other nature) or make any representation which is inaccurate in any particular, or which in any way misrepresents its services, contracts, investments, or financial condition . . ." (12 CFR § 563.27).

The conclusion of law is supported by another circumstance: we call the Court's attention to the legend imprinted on every single page of the Marshall passbooks, reading as follows:

Federal Savings and Loan
Safety
Of Your
Savings
INSURED
Up To
$10,000
Insurance Corporation

When a depositor received a passbook bearing this legend on every single page he was bound to infer that, since the legend appears on the very document recording the balance of his account, that particular account, apart from any other accounts he might have in the institution, was insured to the $10,000 limit. The legend on the passbook has an entirely different character and impact than such a legend or advertising, a sign on the premises, etc. In effect, it is a holding out respecting the particular account on which it appears.

About 20 months after Marshall failed, FSLIC (and FDIC) recognized these very facts. On December 28, 1966, they issued a joint statement "outlining certain principles" (F.R. 16582): (Not even then did they issue a regulation!).

> "In recent years, competition among financial institutions for funds has become intense. An outgrowth of such competition has been the development and use by a few institutions of advertising practices that could be detrimental to the public's attitude toward the nation's financial system. In some respects, certain of the advertising practices are considered misleading.
>
> "Under the circumstances, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and the Board of Governors of the Federal Reserve System have concluded that it would be helpful, both to the financial institutions that they supervise and to the public, to outline certain principles that such institutions should follow in their advertisements directed toward attracting funds.
>
> "The supervisory agencies regard the following as minimum principles that financial institutions should follow in advertising for funds:"

[Items (1)-(3) deal with interest rates.]
Item (4) reads as follows:

> "(4) No statement should be made implying that more than $15,000 of Federal insurance is provided for each depositor in a bank or each member in a savings and loan association."

This announcement was followed in January 1967 by proposed new regulations (32 FR 998, Jan. 27, 1967) and in July, by the new regulations.

In light of this background, the *Merrill* case relied on by the Court of Appeals is wholly inapposite. There, an employee of the Federal Crop Insurance Corporation made a statement to a farmer regarding the insurance of his wheat crop flatly contradictory to the regulations. Relying thereon a farmer insured his crop. There was a loss; he claimed payment and was refused. On these facts, this Court held 5-4, that the crop was uninsured. There, this Court held that the regulations took precedence over estoppel. Here we claim something more than estoppel: for all the reasons set out above, plaintiffs and the class were led to believe their accounts were insured. Not until after the loss did FSLIC admonish the industry about its practices, but it denied liability to those who had suffered loss. Even so, it could point to no specific provision in its regulations for doing so, but was forced to evolve an elaborate exegesis for its action.

The Court below did not apply *Merrill;* it misapplied it. FSLIC was established to protect the savings of the public. The decision below converts the hope of protection, in the words of Mr. Justice Jackson, dissenting in *Merrill,* 332 U.S. at 388, into "an investment in disappointment."

CONCLUSION

Petitioners respectfully request that a writ of certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

[Opinion of Court of Appeals,
No. 16097, March 26, 1968]

JAMES MAHONEY, et al.,

Plaintiffs-Appellees,

vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, ETC.,

Defendant-Appellant.

Before HASTINGS, *Chief Judge,* KILEY and FAIRCHILD, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* This is an action to recover insurance on deposits in a federally insured Illinois savings and loan association (Marshall) which defaulted April 8, 1965. Defendant FSLIC contends that the amounts claimed are in excess of the statutory maximum, which it has already paid. The facts directly presented involve three accounts. Plaintiffs claim that James and June Mahoney held one account, James, June, and their son, John, another, and James, June, and their daughter, Patricia another. This is also a class action on behalf of others similarly situated.

The district court denied FSLIC's motion for summary judgment, and an appeal has been allowed under 28 U.S.C. sec. 1292(b).

12 U.S.C. sec. 1728(a) provided at the time of Marshall's default "that no member or investor of any such institution shall be insured for an aggregate amount in excess of $10,000."[1]

The statute makes no specific provision for the treatment of joint accounts with respect to the maximum insurance per member. 12 U.S.C. sec. 1724(b), besides mak-

[1] The section was amended October 16, 1966, making the maximum $15,000.

ing certain provisions for custodians of public funds and fiduciaries, defines "insured member" as "an individual, partnership, association, or corporation which holds an insured account."

Jointly held accounts, however, are a common phenomenon. Probably to resolve questions and problems which would arise if there were no special provision for them, provision has been made by regulation, as follows:

> "An insured account held jointly is insured in the same manner as an insured account held by a partnership, up to but not exceeding $10,000 jointly to the holders thereof."[2]

No question is raised concerning the validity of the regulation.

FSLIC relies on Illinois statutory and case law governing joint ownership of accounts in savings and loan associations and banks, and contends, in effect, that although James and June Mahoney intended to set up two of the accounts so that each would be held jointly by themselves and one of their children, they failed to accomplish this purpose in the manner required by Illinois law.

The gist of plaintiffs' position seems to be (1) since the insurance is created by federal law, Illinois law need not be applied and effect should be given to the intention of the parties or (2) if Illinois law is to govern, we must apply the Illinois rules which would apply to the creation of a partnership account, because of the reference to partnerships in the regulation above quoted. Also, as an alternative, they suggest that FSLIC does not correctly interpret the Illinois law.

FSLIC contends that each of the three Mahoney accounts involved in this action was held by James and June Mahoney as joint owners and that this combination of persons, or joint ownership, constituted but a single "member" entity, so that the $10,000 maximum applied

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[2] 12 C.F.R. sec. 561.3.

to the aggregate of the three accounts. Plaintiffs would contend that there was a different "member" entity holding each account, so that the $10,000 maximum applied to each account, separately. According to plaintiffs the "member" entity holding account No. 59868 was composed of James and June; account No. 62387, James June and John; account No. 62030, James, June, and Patricia.

We have referred to a "member" entity. The concept arises out of the regulation above quoted which deals specially with jointly held accounts as if the several holders constituted a single "member".

The key question is the identity of the "member" entity which held each of the three accounts and was insured with respect to each. The federal statute clearly contemplates that if several insured accounts are held by one "member", the accounts must be aggregated for the purpose of applying the maximum limitation on insurance. The federal statute and the regulation in the form it had in 1965 simply assume that a "member" can be identified. This federal statute does, of course, provide insurance protection for rights created by transactions governed by state law. It implies, we think, that the law which governs the creation of rights and obligations between account holders and associations answers the question as to the identity of the "member" when applied to the facts. If Mr. and Mrs. Mahoney had all the rights against the association with respect to these accounts in the absence of default, we see no logic in a theory that their children were also constituents of "member" entities for the purpose of insuring such rights.

There can be no dispute about the ownership of account No. 59868. The names at the top of both the ledger sheet and the application and agreement form were: "Mahoney, James or Mahoney, June". Both signed the application and agreement, which contained the following:

> "2. One or more share certificates or an account book, or both, shall be issued to the undersigned

to evidence said account. The undersigned agree that each of said share certificates and said account book (if any is issued) shall be issued in their names as joint tenants with the right of survivorship; the account, and any part thereof, shall be payable to any of them or to the last survivor of them; and any payment made by the Association to any of the undersigned, whether any other of the undersigned shall be living or not, shall be a complete discharge of the Association's obligation as to the amount so paid. The signature of any of the undersigned shall be sufficient to the validity of any withdrawal application, proxy, or other instrument requiring shareholder signature in connection with said account.

"3. The undersigned intend that upon the death of any of them, the survivor or survivors shall be the sole beneficial owner or owners of the account, even if the funds for the account were provided wholly or in part by the decedent."

The application and agreement form was stamped with the legend: "As Joint Tenants with the right of survivorship and not as tenants in common."

Under Illinois Revised Statutes, S.H.A. Ch. 32, sec. 770(a), James and June Mahoney held the account as joint owners with right of survivorship. Either was entitled to withdraw.

The application and agreement form for account No. 62387 was the same except that the names at the top of it (and of the ledger sheet) included John Mahoney: "Mahoney, James or Mahoney, June or Mahoney, John".

Illinois Revised Statutes, S.H.A. Ch. 32, sec. 770(a), part of the Illinois Savings and Loan Act, provides in part:

"If two or more persons opening or holding a withdrawable capital account shall execute a written agreement . . . providing that the account shall be payable to any or the survivor of them, the account,

> and any balance thereof which exists from time to time, shall be held by them as joint owners with right of survivorship and, unless otherwise agreed, any payment by the association of federal association to any of such persons shall be a complete discharge of the association's or federal association's obligation as to the amount so paid."

The agreement was signed only by James and June and conferred rights only upon "the undersigned". Did the addition of "or John Mahoney" in what might be termed the title of the account create any obligation from Marshall to him, or confer upon him any right which he could enforce against Marshall?

We find no Illinois case on all fours.

In *Doubler* v. *Doubler*[3] an individual had a bank account in his own name. Later he instructed the bank to write his wife's name on the passbook and to write: "Payable to either of them or the survivor with full survivorship rights". No agreement was signed by either individual. The court held that there must be an agreement signed by both in order to create rights of survivorship. The original depositor had died and the balance on deposit was awarded to his estate, and not to the surviving wife.

In *Frey* v. *Wubbena*[4] the court approved the *Doubler* holding with respect to bank accounts, saying,

> "However, it was held in Doubler . . . that it is necessary that such an agreement be signed by the parties in order to create rights of survivorship in the deposit. There has been no material change in the statute since Doubler and that decision will not now be disturbed."

The court referred to the Illinois Savings and Loan Act, sec. 770, and said that it

> "contains broad and comprehensive provisions for the creation of rights of survivorship in the case of

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[3] (1952), 412 Ill. 597, 107 N.E.2d 789.

[4] (1962), 26 Ill.2d 62, 185 N.E.2d 850.

> savings and loan association capital accounts, and makes the signing of an agreement among the parties mandatory. . . . By the statutory provisions referred to, the legislature has expressly provided for the creation of survivorship accounts in savings and loan associations and has prescribed the method by which such accounts can be set up."[5]

The parties have cited no Illinois case, to be sure, where two individuals have signed an agreement for joint ownership between themselves, but the title of the account, presumably at their direction, includes the name of a third individual. It is our best judgment, however, in the light of the statute and the views expressed in the Illinois decisions referred to, that in this situation it is the law of Illinois that either or the survivor of the signers may withdraw, but that the non-signing third party may not; that as far as the legal obligations of the association are concerned, the account is held by the two signers as joint owners with right of survivorship.

We think it follows that as to this account, also, James and June Mahoney constitute the "member" of the association for the purposes of insurance by FSLIC.

The situation as to No. 62030 is not entirely identical. The printed form of application and agreement was designed for use by individual depositors, or tenants in common. It was signed by James and June. It contained the following:

> "The undersigned agree that each of said share certificates and said account book (if any is issued) shall be issued in the names of the undersigned, and that the signature of each of the undersigned shall be necessary to the validity of any withdrawal application, receipt, proxy, or other instrument requiring shareholder signature in connection with said account."

The names at the top (as on the ledger card) were "Mahoney, June or Mahoney, James, or Mahoney,

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[5] See, also, recent approval, of *Wubbena* and *Doubler, In re Estate of Morey* (1967), 38 Ill.2d 575, 580.

Patricia (Minor)" and after the names appeared the stamp "As joint tenants with the right of survivorship and not as tenants in common."

It seems clear that Mr. and Mrs. Mahoney are the co-owners of this account, although there is some question whether withdrawals can be made by either or the survivor or whether withdrawals can only be made by both, signing together. On the one hand, the printed portion of the application and agreement provides that each must sign in order to withdraw. On the other hand the stamped legend and the use of the word "or" in the title suggests that either may draw, although the exact language required by sec. 770(a) does not appear.

If the stamped legend, by overriding the inconsistent printed provision, made the agreement signed by the Mahoneys a sufficient compliance with sec. 770(a), then this account was owned by the same "member" entity as the others. If it was not, we think James and June were tenants in common. In such situation, the administrative interpretation, under the existing regulation was that each individual was a different "member" of the association. Plaintiffs have not, in this action, claimed that James and June as individuals were entitled to be paid insurance with respect to these accounts.

Plaintiffs contend that because the regulation provided that "an insured account held jointly is insured in the same manner as an insured account held by a partnership" no more formality is required to create an account held jointly than would be required to open an account for a partnership. We do not agree. It must first be determined whether, under the applicable state law, there is an account held jointly. If one exists, the regulation says it is insured like the account of a partnership.

Plaintiffs have called to our attention new or amended regulations, effective September 1, 1967,[6] 12 C.F.R. sec. 564.9 sets forth rules as to accounts which qualify for

[6] 32 F.R. 10415.

treatment as joint accounts and the manner in which such accounts or interests therein are to be aggregated for application of the maximum limitation on insurance, now $15,000. It is true that this regulation refers to an account owned by tenants in common as an account owned jointly, but it is so treated for insurance purposes "only if each co-owner has personally executed an account signature card and possesses withdrawal rights." The new regulation, of course, was not in effect at the time of Marshall's default, and has no direct application to our case. If there are differences in administrative approach to the problem, they are not of a type which discredit the reasoning we have applied here under the regulation as it existed at the time.

Estoppel.

Plaintiffs claim three grounds on which they say FSLIC is estopped from asserting that the three accounts were not each subject to a separate $10,000 maximum limitation on insurance.

(1) The claim is that certain advertising by savings and loan institutions induced the public to believe that each separate account in an insured institution was insured to $10,000 and that FSLIC ought to be held responsible because it did not direct the institutions to stop this advertising. Plaintiffs do not, however, claim they held this belief, and it is clearly contrary to the statute.

(2) The claim is that "other statements", the context or character of which is not described, which savings and loan institutions issued, but FSLIC did not take action to prevent, induced plaintiffs to believe that separate accounts were each insured up to $10,000 "so long as the depositors therein were not identical with the depositors in another account in the same institution or there existed any difference of ownership between the various accounts." Plaintiffs do claim they relied on this belief. Since it has been decided in this litigation that these accounts are identical as to depositors and owner-

ship, the claimed belief, if erroneous under some circumstances, did not mislead plaintiffs here.

(3) The claim is that FSLIC had authority to examine Marshall's records, should have known that the application and agreements signed by the Mahoneys did not accomplish what they intended, and is estopped to rely on that failure since it did not give notice to plaintiffs.

With respect to (3) affidavits presented by FSLIC on its motion for summary judgment establish that as of September 30, 1966 there were 4,513 savings institutions insured by FSLIC, with some 40,000,000 accounts; that Marshall had 27,197 members, of which about 17,000 were joint accounts; that independent or official audits are made annually for the primary purpose of determining financial condition of institutions and not the insurability of accounts; and that it is not standard auditing procedure to examine signature cards for proper completion.

There is a further claim that FSLIC is estopped to claim that joint owners of an account must all sign because FSLIC approved the printed form of application agreement for joint ownership and it bears at the bottom the printed legend "(One Signature required)". This claim has no merit. The legend is consistent with the provisions of the agreement that the "signature of any of the undersigned" is sufficient for withdrawal, and the like. Significantly, the legend does not appear on the application and agreement for Account No. 62030, the body of which says that "the signature of each of the undersigned" is necessary for withdrawal.

The imposition of responsibilty on FSLIC for plaintiffs' failure to achieve their purpose would be dubious under these circumstances even if FSLIC were not a government instrumentality. In addition, because it is, its funds are protected by the law even where its agents may have caused people to misunderstand the law.[1]

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[1] *Federal Crop Ins. Corp.* v. *Merrill* (1947), 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10, A.L.R. 1075.

We hold, therefore, that there is no genuine issue as to any material fact, and FSLIC is entitled to judgment as a matter of law.

Additional material presented by FSLIC.

The printed appendix filed by FSLIC on appeal presented material which had not been presented to the district court. No objection has been made to an excerpt from a March, 1937 issue of the Federal Home Loan Bank Review nor to excerpts from a July, 1941 Manual of Rules and Regulations for Insurance of Accounts. These excerpts indicate past administrative interpretation consistent with the position of FSLIC in this case, particularly with respect to reliance on the law of the state concerning the creation of a joint account.

The FSLIC appendix also presents 13 letters of attorneys in the office of the general counsel of the Federal Home Loan Bank Board, answering individual inquiries, and a public information pamphlet issued by Marshall. The letters apparently have not been given any public circulation. Plaintiffs have moved that the letters and pamphlet be stricken or disregarded in the consideration of the case.

The challenged documents might well be relevant and helpful material in resolving questions of the type presented here. It would have been better practice to present them to the trial court or to have sought permission, on notice, to present them to us. We have in fact disregarded them in our consideration of the issue.

The order appealed from will be reversed and the cause remanded with instructions to grant judgment for defendant.

[District Court]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Entered December 30, 1966)

Findings of Fact

1. This is a class action to obtain relief from the denial of insurance claims for deposits in a savings and loan association which has become insolvent.

2. This matter arises on a motion for summary judgment filed by defendant. Defendant, by its counsel, has stated in open court that for purposes of its motion, it admits the allegations of the complaint.

3. The named plaintiffs herein are James Mahoney, his wife, June Mahoney, and their minor son, John Mahoney. The defendant is the Federal Savings and Loan Insurance Corporation (FSLIC), a body corporate and instrumentality of the United States, created by an Act of Congress, June 27, 1934, c. 847, Title IV, § 402, 48 Statutes 1258; 12 U.S.C. § 1725 et seq., as amended.

4. Jurisdiction is conferred on this court by 28 U.S.C. § 1331, and 12 U.S.C. 1725(c) (4) in that the amount in controversy exceeds $10,000.00 exclusively of interest and costs, and arises under the constitution and laws of the United States.

5. Sometimes prior to the events set out below, Marshall Savings and Loan Association (Marshall) of Riverside, Illinois, was organized pursuant to the Illinois Savings and Loan Act. Further, sometime prior to the events set out below, Marshall applied to FSLIC for insurance coverage of its deposits. Such application was granted, and thereby Marshall became an "insured institution" as defined by 12 U.S.C. § 1724. Such insurance was subject to the $10,000.00 insurance limitation of 12 U.S.C. 1728.

6. The complaint alleges that on or about October 1, 1964, Marshall became insolvent (the exact date of insolvency is not here in issue and is not here determined for

any purpose). About April 8, 1965, the Director of Financial institutions of the State of Illinois appointed a receiver pursuant to § 10-1 of the Illinois Savings and Loan Act. Ill. Rev. Stat. 1965, C 32, § 921. Marshall is in "default" as defined by 12 U.S.C. § 1724(d), and thereby FSLIC became obligated to make payment to the depositors pursuant to 12 U.S.C. § 1728(b).

7. On various dates in 1963, plaintiffs, along with Patricia Mahoney, who is not a party hereto, opened three separate accounts in Marshall, as follows:

(a) James Mahoney, June Mahoney, and Patricia Mahoney, a minor, in account No. 62030, opened on or about November 29, 1963.

(b) James Mahoney and June Mahoney, in account No. 59868, opened on or about September 5, 1963.

(c) James Mahoney, June Mahoney and John Mahoney, in account No. 62387, opened on or about December 21, 1963. Copies of the respective account cards and ledger cards are attached to the complaint as Exhibits "A", "B", and "C".

8. At the time Marshall was found to be in default, the balances in the three accounts held by the plaintiffs, were as follows:

Account No. 62030—$7,377.41, held by James Mahoney, June Mahoney, and Patricia Mahoney.

Account No. 59868—$10,341.32, held by James Mahoney, and June Mahoney.

Account No. 62387—$6,490.76, held by James Mahoney, June Mahoney, and John Mahoney.

9. Claims totaling $24,209.49 were filed by the plaintiffs with the defendant pursuant to 12 U.S.C. § 1728. The defendant refused to pay more than a total of $10,000.00 on the three claims as a group. It asserted that for the three accounts to be separately insured, it was necessary to comply with all provisions of Illinois state law respecting the establishing of joint tenancies, that Patricia Mahoney was not a joint tenant on account No. 62030 because she did not

sign the account card, and therefore the ownership of account No. 62030 was identical with that of account No. 59868. A similar position was taken as to account No. 62387 and the lack of John Mahoney's signature on the card. Hence, defendant asserted, all three accounts were in the same names and the $10,000.00 limitation was applicable to the three accounts as a group.

Such position was not communicated by FSLIC to plaintiffs and the other members of the class at any time prior to default by Marshall.

10. The defendant paid the claim on account No. 62030 in full. It paid $1,611.27 on account No. 59868, leaving a balance due from Marshall to James Mahoney and June Mahoney of $8,388.73. ($10,000.00 less $1,611.27). It paid $1,011.32 on account No. 62387, leaving a balance due from Marshall to James Mahoney, June Mahoney and John Mahoney of $5,479.44.

11. There are numerous other depositors in Marshall who, like plaintiffs, had two or more accounts at Marshall on October 1, 1964. Defendant, however, because an account card was not signed by a depositor took a position with respect to such depositor similar to that taken respecting Patricia Mahoney and John Mahoney. Hence, defendant took the position that two or more such accounts are in the same names and together are entitled to only a maximum insurance of $10,000.00. Plaintiffs bring this action in a representative capacity on behalf of themselves and all other "such depositors" in Marshall who are situated similarly to them. Said class is more fully defined in the order of this court entered October 14, 1966. Notice of this action has been sent to members of the class in accordance with the order, and the case has been ordered to proceed as a class action under Rule 23(b) (1) and (2) of the Federal Rules of Civil Procedure. There are about 37 such accounts, and the claims against FSLIC of all such depositors, including named plaintiffs, total about $86,200.

12. For many years prior to October 1, 1964, savings and loan institutions throughout the U.S. and in partic-

ular, in Chicago, have informed the public by signs, placards, advertising, television, radio, and otherwise that "accounts" in their institutions were insured to $10,000.00 by Federal Savings and Loan Insurance Corporation. Such statements induced the public to believe that each separate account in an insured institution was insured to $10,000.00.

13. Other statements issued by savings and loan institutions induced the belief that an account was insured up to $10,000.00, even though the depositor in the account had others accounts in that institution, so long as the depositors therein were not identical with the depositors in another account in the same institution or there existed any difference of ownership between the various accounts.

14. Plaintiffs and such depositors were of such belief and so informed by officers or agents of Marshall at the time one of their accounts was opened. But for such belief and such statements by officers and agents of Marshall, they would not have deposited more than $10,000.00 in Marshall. FSLIC knew, or should have known, of the practice of making such statements by savings and loan institutions, and knew or should have known that such statements would induce the beliefs set out above. At no time, however, did FSLIC direct savings and loan institutions (including Marshall) to cease making such statements.

15. Further, FSLIC, as the insurer of the savings deposits had authority at all relevant times to examine the books and records of Marshall, including depositors' ledger sheets, signature cards, and other documents, and did from time to time make such examinations. An examination of the documents of FSLIC prior to Marshall's insolvency would have revealed to FSLIC that plaintiffs and such depositors each had two or more accounts differing, as to the account titles, signature cards, or in other respects. Plaintiffs and such depositors regarded each of such accounts as separately insured, and FSLIC knew, or should have known, that plaintiffs and such depositors

so regarded the accounts. At no time prior to the appointment of a Receiver for Marshall on April 8, 1965 did FSLIC inform plaintiffs or such depositors that it deemed two or more accounts to be identical in ownership, and therefore entitled to insurance as only a single account. Had such notice been given to plaintiffs and such depositors, they would have been put on notice of the position of FSLIC, and could have placed a portion of their funds in another institution if they desired full insurance, or could have taken other appropriate action.

Conclusions of Law

1. This Court has jurisdiction of the parties and the subject matter.

2. The rights of plaintiffs and other such depositors to recover from FSLIC are governed by the Act of June 27, 1934, as amended, 12 U.S.C. 1725 et seq., other federal statutes, and regulations issued by FSLIC, and are not governed by Illinois law.

3. Plaintiffs and other such depositors are "insured members" respecting each account on which their names appear and all their accounts, separately are "insured accounts" under 12 U.S.C. 1724 (b) and (c) respectively.

4. The accounts of plaintiffs and other such depositors are "accounts held jointly" under FSLIC regulations, 12 C.F.R. 561.3, and as such are insured in the same manner as an insured account held by a partnership.

5. There is no requirement in the statutes, or FSLIC regulations, that a depositor, in order to be an "insured member" must sign a signature card, nor is there a requirement that such depositor, in order to be an "insured member" must meet Illinois law requirements as to a joint tenant, or meet any other State law requirement.

6. It would be illegal and inequitable, and contrary, to the intent of the act creating FSLIC insurance to apply to plaintiffs and other such depositors, the legal requirements not expressly stated in the statutes or FSLIC regulations.

7. Plaintiffs and all other such depositors were "insured members" of the accounts on which their names appear, regardless whether they had signed or had not signed the account signature card authorizing them to withdraw funds from the account.

8. FSLIC administrative policy of many years' duration, with respect to savings and loan association advertising and public statements, constitutes an administrative interpretation of the statute and FSLIC regulations that each of the accounts of plaintiffs and each of the accounts of other such depositors is separately insured and FSLIC is estopped from asserting the contrary.

ENTER:

/s/ J. S. PERRY
U.S.D.J.

December 30, 1966

SAMPLE JOINT TENANCY ACCOUNT CARD

—17a—

Account No. 00000

A, Doe, John or
B, Doe, Mary
C,

As Joint Tenants with the right of survivorship and not as tenants in common.

Type (Last Name) (First Name) (Middle Name)

MARSHALL SAVINGS AND LOAN ASSOCIATION, RIVERSIDE, ILLINOIS

1. The undersigned hereby establish a withdrawable share account in the above named Association, in accordance with and subject to all applicable laws and regulations, and to all provisions of said Association's articles of incorporation, by-laws, and resolutions, now or hereafter in force.
2. One or more share certificates or an account book, or both, shall be issued to the undersigned to evidence said account. The undersigned agree that each of said share certificates and said account book (if any is issued) shall be issued in their names as joint tenants with the right of survivorship; the account, and any part thereof, shall be payable to any of them or to the last survivor of them; and any payment made by the Association to any of the undersigned, whether any other of the undersigned shall be living or not, shall be a complete discharge of the Association's obligation as to the amount so paid. The signature of any of the undersigned shall be sufficient to the validity of any withdrawal application, proxy, or other instrument requiring shareholder signature in connection with said account.
3. The undersigned intend that upon the death of any of them, the survivor or survivors shall be the sole beneficial owner or owners of the account, even if the funds for the account were provided wholly or in part by the decedent.
4. The undersigned hereby appoint

Henry J. Moravec or Henry J. Moravec, Jr.

as proxy of the undersigned (with the right of substitution), to vote in the names and on behalf of the undersigned at any meeting of the members or shareholders of said Association as fully as the undersigned might or could if personally present. This proxy shall continue in effect as long as said account shall remain open, or until permanently revoked; but the undersigned may revoke the proxy as to any particular meeting or meetings of the members or shareholders of the Association without affecting the validity of the proxy as to any other meeting of such members or shareholders.

John Doe
A Signature

3722 S. Harlem, Riverside, Ill.
(Type) Address Phone

Mary Doe
B Signature

(Type) Address Phone

DATE Nov. 30, '61

C Signature

(Type) Address

Application and Agreement
Individuals with Survivorship, With Proxy
(One Signature required)

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No. 223

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In the Supreme Court of the United States

OCTOBER TERM, 1968

JAMES MAHONEY, ET AL., PETITIONERS

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

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JAMES MAHONEY, ET AL., PETITIONERS

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FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Under the National Housing Act, 12 U.S.C. 1724, *et seq.*, the Federal Savings and Loan Insurance Corporation ("FSLIC") provides insurance for "insured members" of insured financial institutions.[1] The in-

[1] 12 U.S.C. 1724(b) (Supp. II, 1965-66) defines "insured member" to mean, *inter alia*, "an individual, partnership, association, or corporation which holds an insured account." 12 U.S.C. 1724(c) defines "insured account" to mean "a share, certificate, or deposit account of a type approved by * * * [FSLIC] which is held by an insured member in an insured institution * * *."

surance payable to each "insured member" is limited by statute to a maximum aggregate amount (at the time in question, $10,000),[2] even if the member owns two or more accounts. 12 U.S.C. 1728(a).

In 1965, state authorities appointed a receiver for liquidation of the Marshall Savings and Loan Association ("Marshall"), an Illinois-chartered institution insured by FSLIC under the National Housing Act. In passing upon the resulting claims for insurance, FSLIC determined that $90,206.55 of the $270,206.55 on deposit in some 46 joint accounts in Marshall, was uninsured because the members' accounts exceeded the $10,000 statutory limitation (App. 17; Pet. 5).[3] Petitioners, who held several accounts in Marshall, brought the present class action in the United States District Court for the Northern District of Illinois, to challenge this determination (App. 1-11).

FSLIC's reasoning as to petitioners' three accounts is applicable to all 46 joint accounts at issue here.[4]

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[2] Pursuant to an amendment in 1966, effective as to defaults occurring after October 16, 1966 (80 Stat. 1055), the statutory maximum has been raised to $15,000 per insured member. 12 U.S.C. 1728 (Supp. II, 1965-66).

[3] "App." refers to the Appendix to the Brief for Defendant-Appellant in the court of appeals, a copy of which has been lodged with this Court.

[4] The joint accounts involved in this class action represent only a small fraction of the joint accounts in Marshall, most of which were fully insured by FSLIC (see App. 33). To the extent that their accounts were not fully covered, all depositors, including the plaintiff class, received certificates entitling them to participate in the liquidation of Marshall up to the full amount of their uninsured deposits (Reply Brief for Defendant-Appellant in the court of appeals, p. 3).

The signature-card contract creating each of petitioners' accounts was stamped with the legend "As Joint Tenants with the right of survivorship and not as tenants in common" (Pet. App. 3a-4a, 6a-7a).[5] Each contract stated that the documents representing ownership of the account would be issued to "the undersigned" (*ibid.*). Since each of the contracts was signed solely by petitioners James and June Mahoney (Pet. App. 3a-6a), FSLIC reasoned that they were the sole owners, as joint tenants, of the three accounts, notwithstanding that two of the signature cards each also bore the typed name of one of their children. Since neither of the Mahoney children signed the agreements (Pet. App. 3a-6a), and since under Illinois law a valid joint tenancy is created only as to individuals who sign the written contract creating the account,[6] FSLIC concluded that the typing of the additional names on the agreements did not affect the legal ownership of the accounts (App. 12, 18).[7] Thus, FSLIC determined, there was but a single "insured

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[5] As the court of appeals noted (Pet. App. 7a), the use of the tenancy in common form in connection with one of the Mahoney accounts is irrelevant.

[6] Section 4-10(a) of the Illinois Savings and Loan Act, 32 Ill. Rev. Stat. Ann. § 770(a); Section 2(c) of the Illinois Joint Rights and Obligations Act, 76 Ill. Rev. Stat. Ann. § 2(c). See *Frey* v. *Wubbena*, 26 Ill. 2d 62 (1962).

[7] In addition to the joint accounts involved here, the Mahoneys maintained three revocable trust accounts in Marshall. FSLIC paid the $30,000 insurance on these accounts after determining that such accounts constituted valid trusts under Illinois law (Reply Brief for Defendant-Appellant in the court of appeals, p. 7, n. 3).

member"—*i.e.*, the joint tenancy consisting of James and June Mahoney—to whose accounts the $10,000 statutory limitation applied, so that deposits in excess of that aggregate figure were uninsured (App. 12, 17).[8]

Petitioner contended in the courts below that, for insurance purposes, FSLIC should have recognized that the accounts constituted three separate "insured members," on the ground that failure to comply with the signature requirements of Illinois law was irrelevant under federal law (App. 1-6).[9] The district court denied FSLIC's motion for summary judgment, and entered findings of fact and conclusions of law imposing liability on FSLIC (App. 17-27). The court of appeals unanimously reversed, holding that FSLIC was entitled to judgment as a matter of law (393 F.2d 156; Pet. App. 1a-10a).

The decision of the court of appeals is correct, is not in conflict with any other decision, and is, in light of recent regulations, of little prospective significance.

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[8] Although the definition of "insured member" in 12 U.S.C. 1724(b) does not expressly provide for joint tenancies (see n. 1, *supra*), 12 C.F.R. 561.3 (1963 ed.) stated that "An insured account held jointly is insured in the same manner as an insured account held by a partnership, up to but not exceeding $10,000 jointly to the holders thereof."

[9] Petitioners concede that FSLIC's reading of Illinois law (which they disputed below) is not "appropriate for review" by this Court (Pet. 2, n. 1). It is unclear whether petitioners are presently relying on the estoppel theory which they also urged below (App. 6-8; Pet. App. 8a-10a, 16a). See note 13, *infra*, p. 6.

1. Contrary to petitioners' assertions (*e.g.*, Pet. 7-8), the court of appeals did not hold that state law determines the scope and amount of FSLIC insurance under the National Housing Act. The court of appeals simply held that controlling federal law looks to state law as delineating the identity of an entity (such as a joint tenancy) claiming membership in the insured financial institution (Pet. App. 3a). It is only that threshhold question which is involved, and only that issue which was held to turn on state law.

The court's ruling is correct. Many of the financial institutions which are insured under the National Housing Act (*e.g.*, state-chartered savings and loan associations such as Marshall) were in existence long before the establishment of FSLIC in 1934. As the provisions of the Act demonstrate,[10] the FSLIC insurance program was superimposed upon, and presupposed the existence of, a body of state law governing the relationship between the financial institutions and their members.[11] Moreover, Congress itself

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[10] Thus, while 12 U.S.C. 1724(b) provides that an "insured member" may be one of a variety of legal entities (*e.g.*, partnerships, corporations, trusts, community property accounts of husbands and wives), the Act does not define the legal requirements for establishing any of the listed legal entities.

[11] Federal statutes often incorporate provisions of state law—particularly where, as here, the subject concerns concepts of property which are deeply rooted in state law. See, *e.g.*, *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204, 210; *United States* v. *Loan & Bldg. Co.*, 278 U.S. 55; *De Sylva* v. *Ballentine*, 351 U.S. 570, 580. In particular, the courts have consistently looked to state law for the initial determination of whether there has been created an insurable legal entity which is entitled to insurance coverage by a com-

has acted on this very premise. Thus, in 1959, Congress amended the section of the National Housing Act here involved, 12 U.S.C. 1724(b), to provide a special definition for "insured member," in order to override the impact of the "community property" approach followed in several states.[12]

2. Contrary to petitioners' contention (*e.g.*, Pet. 19), the ruling of the court of appeals is supported by the long-standing administrative construction of the Act.[13] The March 1937 issue of the Federal Home

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parable agency, the Federal Deposit Insurance Corporation. See *Phair* v. *FDIC*, 74 F. Supp. 693 (D. N.J.); *Connor* v. *FDIC*, 112 Vt. 380, 26 A. 2d 105; *FDIC* v. *Casady*, 196 F. 2d 784 (C.A. 10); *Billings County* v. *FDIC*, 71 F. Supp. 696 (D. N.D.), modified on other grounds, 168 F. 2d 452 (C.A. 8).

[12] 73 Stat. 262. See S. Rep. No. 491, 86th Cong., 1st Sess., pp. 1-2 (1959).

[13] In both courts below, this argument was understood to turn on principles of estoppel (see Pet. App. 8a-9a; 16a). In this Court, petitioners seem to disclaim (Pet. 23) any present reliance on the estoppel theory which they urged below (App. 6-8). In any event, as the court of appeals held, that theory is of no avail. FSLIC can not be estopped because Marshall and other savings and loan associations may have misled depositors by statements as to the insurability of accounts which were inconsistent with the $10,000 statutory limitation. Moreover, the record shows that, after learning of such misstatements, FSLIC acted, within the limitations of its statutory authority, to prevent further publication of misleading information (App. 13). Nor can FSLIC be estopped because its audits did not disclose petitioners' noncompliance with Illinois law. FSLIC conducts audits for the primary purpose of determining the financial condition of insured institutions, and not for the purpose of determining the insurability of accounts (App. 34-35). Indeed, it would be impossible for FSLIC to examine each account to determine its insured

Loan Bank Review, published by the Federal Home Loan Bank Board (the operating head of FSLIC), stated (p. 187) that "the status of ownership of an insured account is determined in accordance with the investment contract and the law of the State in which the contract is made * * *"; and that "Ownership, as so determined, will control the settlement of insurance * * *." [14] This early administrative construction has been consistently followed by the Board (see App. 54-70), and has been recognized by the savings and loan industry.[15]

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status. On September 30, 1966, FSLIC insured 4,513 institutions with some 40,000,000 accounts, and on April 8, 1965, Marshall alone had 27,197 members with about 17,000 joint accounts (App. 32-33).

[14] Petitioners' reliance (Pet. 16) upon FSLIC's approval of the signature card forms used by Marshall is misplaced. As the court of appeals noted (Pet. App. 9a), the legend on the cards, "One Signature required," merely restated the provision of the contract that the "signature of any of the undersigned" is sufficient for withdrawal.

12 C.F.R. 561.3 (1963 ed.) (see n. 8, *supra*, p. 4) merely confirms that joint accounts, like partnerships, are entities insurable under the Act independently of the individuals who form them. Contrary to petitioners' assertion (Pet. 15), FSLIC did not concede below that a partnership is validly established, as a matter of *federal* law, by the signature of a single partner; it merely recognized that most *state* laws do not require the signatures of all partners (Brief for Defendant-Appellant in the court of appeals, p. 11; Reply Brief for Defendant-Appellant in the court of appeals, p. 8).

[15] The *United States League Federal Guide* (May 1968) published by the United States Savings and Loan League as a standard reference service for the industry, states (¶ L 9-45.1):

> To be insured by the FSLIC as a joint savings account, the account must qualify as a joint tenancy account under the state law.

3. Recent regulations adopted by the Federal Home Loan Bank Board, effective September 1, 1967, reaffirm that FSLIC insurance extends only to accounts held under forms of joint ownership "valid under State law * * *." 12 C.F.R. Part 564, Appendix F (1968 ed.).[16] The new regulations now add, however, an independent federal requisite that will eliminate for the future the type of question raised by petitioners, for it is now uniformly specified that a "joint account shall be deemed to exist, for purposes of insurance of accounts, only if each co-owner has personally executed an account signature card and possesses withdrawal rights." 12 C.F.R. 564.9(b) (1968 ed.). These regulations, adopted pursuant to a 1966 amendment to the Act,[17] render the issues raised by the petition devoid of prospective significance.

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[16] Congress provided in 1966 that suits to which FSLIC is a party "shall be deemed to arise under the laws of the United States * * *" (80 Stat. 1042). Contrary to petitioners' contention that this signaled the applicability of federal substantive law to all issues in FSLIC litigation (Pet. 10), this provision was merely added to confirm FSLIC's right to remove actions from state courts without regard to the amount in controversy. S. Rep. No. 1482, 89th Cong., 2d Sess., p. 19 (1966).

[17] The amendment was designed to enable FSLIC to "bar the use of devices such as numerous joint accounts in various combinations * * * to obtain insurance far in excess of the limits established by Congress." 112 Cong. Rec. 26472 (October 13, 1966). It authorized FSLIC to define the statutory terms used in 12 U.S.C. 1724(b) and (c) and to prescribe "the extent of the insurance coverage * * *" (80 Stat. 1056).

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1968.

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SUPREME COURT, U. S.

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No. 223

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JAMES MAHONEY, ET AL.,

Petitioners,

vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,

Respondent.

PETITIONERS' REPLY TO MEMORANDUM OF RESPONDENT

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PETITIONERS' REPLY TO MEMORANDUM OF RESPONDENT

Our petition raises the question whether the right to federal savings and loan insurance is governed by federal or by state law. The decision below applies state law. The petition contends that federal law should govern, citing the statute itself, (Pet. 9-10) a flood of case authority (Pet. 11-12) and the need for national uniformity. (Pet. 12-13). Because of the enormous importance of the savings and loan industry in our economy, the question, we think, deserves an authoritative answer from this Court.

1. *Federal law controls.* FSLIC avoids response to this central issue with the claim (FSLIC p5) "The court

of appeals simply held that controlling federal law looks to state law as delineating the identity of an entity (such as a joint tenancy) claiming membership in the insured financial institution." This "delineation" distinction we submit is an FSLIC invention. The authorities we cited (Pet. 11-12) do not distinguish between the substantive law applicable to a federal issue and a "delineation" of the sphere of applicability of the federal enactment. The distinction—if accepted—would work endless mischief for it would engender a gossamer of case law casuistry as to whether an issue was "substantive" (and hence controlled by federal law) or a question of "delineation" (to which state law applied). The fact is that "delineation" is itself a federal question: e.g., the scope of a federal land grant (*Hughes* v. *Washington,* 389 U.S. 290, 19 L Ed.2d. 530 (1968) (Pet. 12); the "sale" of natural gas in interstate commerce (*United Gas Improve Co.* v. *Continental Oil Co.,* 381 U.S. 392 (1965) (Pet. 11); the tax definition of "partnership" (*Commissioner* v. *Culbertson,* 337 U.S. 733 (1949) (Pet. 15). Under the Securities Exchange Act of 1934 the question whether withdrawal capital shares in a savings and loan association constitutes a "security" for purposes of the Act is itself a federal question. *Tcherepnin* v. *Knight,* 389 U.S. 332, 19 L.Ed. 2d 564, 570 (1968).

FSLIC reliance upon several cases in this Court is misplaced (FSLIC p. 5). In *RFC* v. *Beaver County,* 328 U.S. 204, a federal statute authorized states to tax real property held by an RFC agency "to the same extent according to its value as other real property is taxed." The holding of this Court relied upon this language as authority to depart from the usual rule that federal statutes are to be given a uniform national interpretation. *U.S.* v. *Cambridge Loan and Building Co.,* 278 U.S. 55, no longer appears to be good law. See *Commissioner*

v. *Culbertson*, 337 U.S. 733, 93 L. Ed. 1659 (1949). In *DeSylva* (FSLIC p. 5), the question was whether an illegitimate child was a "child" entitled to exercise a copyright renewal. Under local law, he was and that law was applied. There it appeared that application of local law effectuated federal policy. But even so, Justices Douglas and Black, in a separate opinion, 351 U.S. at 583, commenting on this very point, expressed the view that the question should be settled as a federal matter.

We rested our claim for the applicability of federal law, not only on the cases at Pet. 11-12 but also on the text of the National Housing Act, and especially on a 1966 amendment to the statute (Pet. 10). FSLIC answers (FSLIC p. 8, n. 16) that the amendment was designed only to confirm the FSLIC right to remove cases from a state to a federal court, citing S. Rept. No. 1482, 89th Cong., 2d Sess. p. 19 (1966).

This answer is wholly inaccurate. The relevant section, Sec. 1730 (k) (1) has three subsections. Subsection C does indeed authorize removal, and S. Rept. 1482 so notes. But we rely on Subsection B. (Pet. 10). As to this, the Report states:

> "(B) provide[s] that any action to which the Corporation shall be a party shall be deemed to arise under the laws of the United States and that the United States district courts shall have original jurisdiction of such actions, without regard to the amount in controversy, ..."

The conclusion is inescapable that our interpretation of "B" is correct. It does "signal" the "applicability of federal substantive law" to FSLIC litigation. (cf. FSLIC p. 8, n. 16).

2. *FSLIC raises a specious claim of "administrative construction"*. FSLIC claims that the ruling of the court

below applying state law is supported by "the long-standing administrative construction of the act." (FSLIC p. 6). This assertion is wholly lacking in merit. The administrative construction rule applies only to public pronouncements of an agency.[1]

What does FSLIC (FSLIC p. 7) serve up in support of its "long standing administrative construction?" Without authorization, FSLIC included in its Court of Appeals appendix a 1937 article in the Federal Home Loan Bank Review, an intra-office memorandum, and 12 items of private correspondence, dating to the 1930's. We moved that these documents be stricken. The Court of Appeals stated that the letters "apparently have not been given any public circulation" (Pet. 10a) and added that it disregarded them in its consideration. Yet FSLIC now feels impelled again to rely on these letters, even though not one was ever published as agency policy. Unearthing these documents is not an exercise in administrative construction. It is rather exhumation of the administrative necropolis.

3. *The accounts were validly insured as partnership accounts under FSLIC regulations.* In our petition (Pet. 15) we pointed out that FSLIC Reg. Sec. 561-3, here applicable, created the term "account held jointly" to embrace all forms of co-ownership accounts, not just

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[1] E.g., in *U.S.* v. *Leslie Salt Co.*, 350 U.S. 383, 100 L.Ed. 441 (1946). (Published Treasury Decisions). *Udall* v. *Tallman*, 380 U.S. 1, 13 L.Ed. 2d 616 (1965) makes the very point—it speaks of an interpretation made a "matter of public record" (380 U.S. at 4). In *Edward's Lessee* v. *Darby*, 25 U.S. (12 Wheat.) 210, 6 L. Ed. 603, it was a public survey of lands around salt licks and salt springs. In *Norwegian Nitrogen Products* v. *U.S.*, 288 U.S. 294 at 313, 77 L.Ed. 796 (1933), the practice was reported to Congress. In *Masur* v. *Stein*, 347 U.S. 201, 212, 98 L.Ed. 630, the administrative practice was set out in the Federal Register.

technical state law joint tenancies, and provided that such accounts were insured as an insured account held by a partnership. It is not disputed that a validly insured partnership account needs only the signature of one partner. One studying the regulation would surely conclude that one signature sufficed, and would scarcely foresee that, after default, FSLIC would, in the face of its own regulation and in the face of the FSLIC approved "one signature only" legend on the signature card, import state law concepts to avoid liability.

We so argued at Pet. 15-16. FSLIC contents itself with a footnote summary of Reg. 561.3. (FSLIC p. 4, n. 8). Thus FSLIC, which now urges that "delineation" is a state law question, itself delineated, as a federal matter, the area of "accounts held jointly" and declared the applicable substantive (partnership) rule applicable to them.

4. *The new regulations magnify, not diminish, the need of review.* FSLIC calls attention to FSLIC regulations, effective September 1, 1967, requiring each co-owner to sign a signature card. It urges that hence there is thus "an independent federal requisite" that will eliminate for the future the question raised by petitioners. On the contrary the new regulation accentuates the underlying issue of the case—whether federal or state law controls. A joint account valid as such under the law of a State which does not require all joint owners to sign a signature card (cf. *Connor,* FSLIC p. 6), under the new regulations, is no longer valid as a joint account for FSLIC insurance purposes. We think the new federal regulations requiring signature of all co-owners is valid, but the holding below casts grave doubt on their validity. Under that holding, State law and State law only controls.

There are other areas of the new regulations under a similar cloud. Thus the insurance accorded associations,

partnerships and corporations under the new regulations depends upon whether or not they are engaged in an "independent activity", an FSLIC created term. We think this provision too is valid, but the thrust of the decision casts grave doubt upon it, and thus renders uncertain the scope of federal insurance. There are other provisions in the regulations which specifically override state law concepts, invent new concepts and impose rules utterly out of harmony with state law.

FSLIC seeks to justify the new regulations by a 1966 amendment to the statute (FSLIC p. 8 n. 17). We anticipated this contention. (Pet. 13), pointing out that the 1966 amendment grants no new substantive power to FSLIC. Since 1934 FSLIC and its parent, the Federal Home Loan Bank Board, has had general rule making power and has exercised this power for decades. See, as an example, the very definition of "insured member" and "insured account" at Pet. 3.

5. *The accounts are insured under FSLIC long standing policy determinations of the National Housing Act.* Our final contention (Pet. 19-23) is that petitioners' accounts are insured in the light of FSLIC's long-standing policy determinations respecting the National Housing Act stemming from its awareness of the industry assertions, year after year, in every medium of communication, that "accounts" in their institutions were insured to $10,000 by FSLIC. We need not speculate as to FSLIC knowledge of industry claims, because one of the most telling examples was FSLIC approved: Every page of every Marshall passbook (the form of which was FSLIC approved) bore a legend "Safety of your savings insured up to $10,000.00". These words were encircled by the phrase "Federal Savings and Loan Insurance Corporation". Would not a depositor given such a passbook think that the account it represented, apart from

any other accounts he had in the institution, was insured to $10,000? Twenty months after Marshall failed, FSLIC (and FDIC) for the first time took public note of the misleading character of these claims and compelled the institutions to modify their advertising practices. FSLIC (p. 6, n. 13) takes note of the joint statement but fails to point out that it was made nearly *two years* after Marshall failed.

Based upon the facts we contend that the Court below erroneously relied upon this Court's decision in *Federal Crop Insurance* v. *Merrill,* 332 U.S. 380 (1947) (Pet. 19). The scope of that doctrine, in light of the facts at bar, we think warrants review here.

FSLIC takes cognizance of these contentions, simply in a line or two in a footnote (See FSLIC p. 8, n. 17). We think our claims, affecting as they do millions of savings and loan investors, merit review here.

Respectfully submitted,

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